Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

October Term, 1998

MICHAEL IDARECIS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a district judge's refusal to give an entrapment charge to be reviewed de novo or only for abuse of discretion -- a question on which the Second Circuit is in conflict with virtually all the other circuits?

PARTIES TO THE PROCEEDING

There are no parties to the proceedings below other than those named in the caption.

TABLE OF CONTENTS

Page

Question Presented i
Parties to the Proceeding ii
Table of Contents iii
Table of Citations v
Opinions Below 1
Statement of Jurisdiction 1
Statutory Provisions Involved 2
Statement of the Case 4
A. Introduction 4
B. Factual Background 4
1. Summary 4
2. Factual Details 5
(a) Idarecis's Hobby 5
(b) April 3, 1996 6
(c) April 4, 1996 7
(d) The Later Transactions 8
(e) AFT Agent Allen's Concern About Entrapping Idarecis 9
C. Proceedings Below 9
1. The Indictment 9
2. The Trial and the Ruling on the Entrapment Defense 10
3. The Government's Summation 10
4. The Summary Order of the Second Circuit .. 11

Table Of Contents (cont'd)

Page

REASONS FOR GRANTING THE WRIT 13

THE PETITION SHOULD BE GRANTED BECAUSE THE SECOND CIRCUIT'S SUMMARY ORDER CONFLICTS WITH THE DECISIONS OF VIRTUALLY ALL OTHER COURTS OF APPEALS ON THE SAME IMPORTANT MATTER -- THE STANDARD OF REVIEW APPLICABLE TO A DISTRICT JUDGE'S FAILURE TO GIVE THE ENTRAPMENT CHARGE

CONCLUSION 18

TABLE OF CITATIONS

Cases Cited:

Agosta v. Immigration and Naturalization Service, 436 U.S. 748, 98 S.Ct. 2081 (1978) 15

Jacobson v. United States, 503 U.S. 540, 112 S.Ct. 1535 (1992) 14

Mathews v. United States, 485 U.S. 58, 108 S.Ct. 883 (1988) 14

Miller v. Fenton, 474 U.S. 104, 106 S.Ct. 445 (1985) 15

Ornelas v. United States, 517 U.S. 690, 116 S.Ct. 1657 (1996) 15

Sherman v. United States, 356 U.S. 369, 78 S.Ct. 819 (1958) 12

Stevenson v. United States, 162 U.S. 313, 16 S.Ct. 839 (1896) 15

United States v. Brown, 136 F.3d 1176 (7th Cir. 1998) 13

United States v. Clarke, 1997 U.S. App. LEXIS 30126 (6th Cir. 1997) (unpublished) 13

United States v. Fleishman, 684 F.2d 1329 (9th Cir. 1982), cert. denied, 459 U.S. 1044 (1982) 16

United States v. Gates, 967 F.2d 497 (11th Cir. 1992) 13

United States v. Gole, 158 F.3d 166 (2d Cir. 1998) 15

United States v. Glover, 153 F.3d 749 (D.C. Cir. 1998) 13
United States v. Idarecis, 1998 WL 716568 (2d Cir. 1998) 1
United States v. Idarecis, 97 CR 88 (CBA) (E.D.N.Y. 1997) 1
United States v. Layeni, 90 F.3d 514 (D.C. Cir. 1996) 13
United States v. Lewis, 987 F.2d 1349 (8th Cir. 1993) 13
United States v. Mayo, 705 F.2d 62 (2d Cir. 1983) 16
United States v. McKenna, 889 F.2d 1168 (1st Cir. 1989) 13
United States v. Nations, 764 F.2d 1073 (5th Cir. 1985) 13
United States v. Nusz, 1994 U.S. App. LEXIS 2940 (p. 7) (10th Cir. Feb. 18, 1994) (unpublished opinion) (reported in table case format at 17 F.3d 1437) 13
United States v. Ortiz, 804 F.2d 1161 (10th Cir. 986) ... 13
United States v. Panet-Collazo, 960 F.2d 256 (1st Cir. 1992) 13
United States v. Pilarinos, 864 F. 2d 253 (2d Cir. 1988) . 11
United States v. Reynolds, 1993 U.S. App. LEXIS 10265, reported in table case format at 992 F.2d 1220 (9th Cir. 1993) (unpublished opinion) 14
United States v. Rodriguez, 858 F.2d 809 (1st Cir. 1988) 13

United States v. Russell, 411 U.S. 423, 93 S.Ct. 1637 (1973)) 14
United States v. Santiago-Godinez, 12 F.3d 722 (7th Cir. 1993) 15
United States v. Singh, 54 F.3d 1182 (4th Cir. 1995) 13
United States v. Wright, 921 F.2d 42 (3rd Cir. 1990) 13

Statutes Cited:

18 U.S.C. § 921(a)(11) 2
18 U.S.C. § 921(a)(21)(C) 2
18 U.S.C. § 921(a)(22) 2
18 U.S.C. § 921(a)(28) 6
18 U.S.C. § 922(a)(1) 3
18 U.S.C. § 922(k) 3
18 U.S.C. § 922(o)(1) 6
26 U.S.C. § 5845(b) 6
28 U.S.C. § 1254(1). 1

Other Authority Cited:

Moore's Federal Practice (Matthew Bender, 1997 ed.) ... 15

APPENDIX

Appendix A - Summary Order of the United States Court of Appeals for the Second Circuit, Filed October 9, 1998 ..... A1

Appendix B - Decision of the United States District Court for the Eastern District of New York, Rendered from the Bench during Trial, April 28, 1997 ..... B1

Petitioner Michael Idarecis ("Idarecis") respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The Summary Order of the United States Court of Appeals for the Second Circuit is not published but is reproduced in Appendix A and may be found at 1998 WL 716568 (2d Cir. (N.Y.)) and 1998 U.S. App. LEXIS 25991. The decision of the District Court in United States v. Idarecis, 97 CR 88 (CBA) (E.D.N.Y. 1997), denying Idarecis's request to have the jury charged on the entrapment defense, was rendered orally from the bench on April 28, 1997 and is reproduced herein as Appendix B.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit ("the Second Circuit") was entered on October 9, 1998 (App. A). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). Counsel for petitioner acknowledges that this Petition is being filed fifteen days beyond the 90-day period, but respectfully requests this Court to waive the time limit, which it may do in criminal cases. The reason for the untimeliness is that counsel for Petitioner, when calculating the time period, mistakenly utilized the date of the issuance of the mandate from the Second Circuit, November 2, 1998, as the beginning of the time period.

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are contained in Title 18:

§ 921. Definitions

(a) As used in this chapter —

(11) The term "dealer" means (A) any person engaged in the business of selling firearms at wholesale or retail

* * *

(21) The term "engaged in the business" means

(C) as applied to a dealer in firearms, as defined in section 921(a)(11)(A), a person who devotes time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms, but such terms shall not include a person who makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of this personal collection of firearms.

* * *

(22) The term "with the principal objective of livelihood and profit" means that the intent underlying the sale or disposition of firearms is predominantly one of obtaining

livelihood and pecuniary gain, as opposed to other intents, such as improving or liquidating a personal firearms collection.

* * *

§ 922. Unlawful acts.

(a) It shall be unlawful —

(1) for any person —

(A) except a ... licensed dealer, to engage in the business of ... dealing in firearms ....

(k) It shall be unlawful for any person knowingly ... to possess or receive any firearm which has had the importer's or manufacturer's serial number removed, obliterated, or altered and has, at any time, been shipped or transported in interstate or foreign commerce.

STATEMENT OF THE CASE

A. Introduction

The fundamental question in this case is whether a defendant convicted in a federal criminal trial is entitled to have a court of appeals review de novo the trial judge's failure to charge the jury on the entrapment defense. The Second Circuit in this case, relying on its own precedent, adhered to an abuse-of-discretion standard of review. All of the other circuits considering the question, save one, review this question de novo. Moreover, this Court's opinions on related issues suggest that the courts of appeals should review de novo a district judge's refusal to charge the entrapment defense. The conflict among circuits aside, since the defense of entrapment is often raised because of the Government's extensive use of undercover agents and informants, the question of the proper standard of review is important and merits clarification and settlement by this Court.

B. Factual Background

1. Summary

As set forth in more detail below, undercover operatives of the Bureau of Alcohol, Tobacco and Firearms ("ATF") repeatedly sought to purchase rifles from Idarecis, a gun hobbyist with a collection of rifles who was also in financial difficulty. The ATF sought to build a case against him for violating the federal firearms laws' prohibition of unlicensed "dealing" in firearms. Eventually, Idarecis — over an eight-month period — sold five rifles to the ATF undercover team. [1]At the specific insistence of the undercover "buyers,"

[1] The mere selling of rifles, even without a license, does not constitute "dealing" per se. Instead, the statutory definition of dealing in firearms sets forth an elaborate factual test requiring, inter alia, the

Idarecis also attempted to "automatize" — make fully automatic — the rifles he sold. After the first sale, Idarecis also arranged to remove the serial numbers on three of the rifles which, as automatic rifles, would be illegal to possess.

Idarecis announced an entrapment defense. Indeed, the Government admitted inducing Idarecis to engage in the "automatizing" of the rifles. However, in the face of this admitted inducement — and as an apparent strategy to circumvent an entrapment defense — the Government did not charge Idarecis with possession of automatic rifles. Instead, the indictment only charged unlicensed dealing in firearms, possessing rifles with obliterated serial numbers and conspiring to engage in those acts. Despite Idarecis's testimony that he originally never intended to sell automatic rifles nor remove serial numbers, and that he was "sucked in" to these transactions, the district court refused to charge the jury on the entrapment defense.

2. Factual Details.

(a) Idarecis's Hobby

Petitioner Idarecis, a 28-year old with no criminal record, was a manager and part owner of Audio Unlimited, which did professional audio and lighting work for parties and live musical performances. For a hobby, Idarecis was also a gun collector who over a several-year period made lawful,

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expenditure of "time, attention and labor," and requiring the "repetitive purchase and resale of firearms," but excluding both "occasional sales by a hobbyist" and the sale of "all or part of [a] ... personal collection ...." 18 U.S.C. § 922(a)(21)(C). See, infra, pp. 9-10, 11. There is no evidence that Idarecis was believed to be committing any offense involving firearms or otherwise at the time the ATF sought to purchase rifles from his collection.

documented purchases of rifles from licensed dealers. Idarecis also obtained all the requisite permits to own and fire these rifles recreationally. According to a Government witness, Idarecis only "collects for himself."

In early 1996, after encountering financial difficulties, Idarecis began trying to sell his rifle collection to several retail gun dealers. However, the dealers only offered to take the rifles on consignment, with no immediate prospect of payment. Idarecis one day expressed his frustration — about his effort to sell his rifle collection — to one of his part-time employees, Ray Brinkley. Brinkley, in turn, mentioned to Idarecis that another part-time employee, Paul Caputo, knew someone who might be interested in purchasing the rifles. Caputo eventually contacted a friend who, in turn, introduced James Tucker to Caputo. Tucker was an ATF informant of 15 years' duration. Tucker knew Caputo was acting on behalf of Idarecis and expressed to Caputo his interest in buying Idarecis's rifles. Eventually, Caputo introduced Tucker and later ATF undercover agent Arnold Allen to Idarecis.

(b) April 3, 1996

On April 3, 1996, Tucker met Idarecis and told him that he only wanted to buy "fully automatic" rifles. Tucker also wanted to see the rifles before agreeing to buy them, but when Idarecis showed Tucker some of his rifles, they were still only semi-automatic. [2]Tucker repeated that he would buy some but only if they were made fully automatic. [3]Idarecis

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[2] "Semi-automatic" means a rifle can fire only by repetitive pulls on the trigger. 18 U.S.C. § 921(a)(28). Such rifles were then legal to purchase and own. "Fully automatic" means that one pull of the trigger would result in numerous shots without pulling the trigger again. Such a rifle is called a "machine gun". 26 U.S.C. § 5845(b). Possession of a machine gun is itself illegal. 18 U.S.C. § 922(o)(1).

[3] The Government in its opening statement and throughout the trial

testified he never intended to alter the rifles until pressed by Tucker, and even then, Idarecis initially told Tucker that he simply would "find out about making them fully automatic."

Tucker then arranged for Idarecis to have Caputo meet ATF Agent Allen (Tucker's "customer") the next day to purchase one rifle, which Idarecis, at Tucker's request, was by that time supposed to make automatic.

There was evidence that Idarecis was not predisposed to "deal" in firearms, automatize the rifles, or remove serial numbers. At trial, Idarecis twice testified that he had been "sucked in" to these transactions. He further explained his state of mind about selling his rifle collection:

> Q: In what condition did you intend to sell these firearms initially, originally?
>
> A: Initially I never intended to sell the firearms. When I did intend to sell them at one point, that was in the conditions that they were in already.

(c) April 4, 1996

On April 4th, Caputo — acting for Idarecis — met with Tucker and Tucker's "customer", ATF undercover Agent Allen, who was a veteran of forty undercover operations. Brinkley had arranged this meeting. [4] Caputo brought the rifle that Tucker had discussed with Idarecis the day before. A discussion about removing serial numbers ensued, indicating that Idarecis would not remove serial numbers from rifles except

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conceded there was Government inducement of the automatization.

[4] The dealings between Tucker and Allen, on the one hand, and Idarecis, on the other, were largely conducted through Caputo and Ray Brinkley, both of whom were Idarecis's employees at Audio Unlimited.

for Tucker and Allen, since they wanted the rifles made fully automatic — and, thus, illegal to possess — while other hobbyists would not. Although disputed by the Government, some evidence pointed to Tucker as the one who affirmatively asked Idarecis to remove the serial numbers.

After showing Tucker and Allen the rifle, Caputo brought it back to Idarecis and Brinkley. Caputo then returned it to Allen and Tucker, who paid for it. Despite the effort to "automatize," it only fired a single shot — no longer even semi-automatically. Although Idarecis's employees had agreed with the ATF undercover team to remove the serial number, the serial number was in fact not removed from this first rifle.

(d) The Later Transactions

After the first transaction, Caputo brought two of Idarecis's other rifles to Tucker and Allen for approval and they left a down-payment. As with the first, these two rifles also did not operate fully automatically — despite the insistence of Tucker and Allen. Allen and Tucker then returned these two rifles and purchased two other rifles, which they received from Idarecis. One of these rifles had the serial number removed.

From May to December, 1996, there was virtually no contact between the ATF undercover team and Idarecis. On December 16, 1996, Agent Allen called Idarecis to see if Idarecis still had the two rifles that were previously rejected in the spring. At Allen's request, Idarecis arranged a sale of these rifles to Agent Allen. Caputo was then arrested with these rifles in his possession, with the serial numbers removed.

(e) AFT Agent Allen's Concern About Entrapping Idarecis

So obviously "entrapping" were the activities of the ATF undercover team that in the midst of the investigation, Agent Allen took the unusual step of contacting an Assistant U.S. Attorney to determine if his repeated overtures to Idarecis constituted entrapment.

C. Proceedings Below

1. The Indictment

The indictment charged Idarecis with four counts: conspiring to engage in the business of dealing in firearms without a license (Count One); engaging in the business of unlicensed dealing in firearms (Count Two); conspiracy to possess firearms with serial numbers removed (Count Three); and possession of firearms with serial numbers removed (Count Four).

The definition of unlicensed "dealing" in firearms is somewhat opaque, requiring the Government to prove Idarecis "engaged in the business of selling firearms at wholesale or retail", a term which, however, is itself further defined by requiring the government to prove that Idarecis devoted:

> (C) ... time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms, but such terms shall not include a person who makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection of firearms.
>
> 18 U.S.C. § 922(a)(21)(C)

The term "with the principal objective of livelihood and profit" is itself defined by the statute to require proof that:

> the intent underlying the sale or disposition of firearms is predominantly one of obtaining livelihood and pecuniary gain, as opposed to other intents, such as improving or liquidating a personal firearms collection.
>
> 18 U.S.C. § 921(a)(22)

2. The Trial and the Ruling on the Entrapment Defense

Idarecis's trial counsel opened to the jury solely with the entrapment defense, which he believed the jury would be able to consider. However, at the close of the defense case, the district court found no evidence of inducement to remove the serial numbers and held, as to the dealing charge, that Idarecis's testimony, including his explanation that he was "sucked in", was insufficient to show lack of predisposition. "[T]hat kind of conclusory statement in light of his other testimony doesn't seem sufficient to this Court"[5]. (B3). The district court then found that evidence of predisposition was "uncontradicted." Accordingly, the district court refused to give the entrapment issue to the jury. (B1 -B3).

3. The Government's Summation

After successfully persuading the district court to refuse the entrapment defense as to the charges in the indictment, the Government argued in summation that Idarecis's automatizing

[5] In this regard, the District Court relied on Idarecis's testimony of conversations with the undercover team after their first contact with him, (B3) instead of evaluating his state of mind "prior to first being approached by government agents. " Jacobson v. United States, supra, 5203 U.S. at 549.

the weapons — which it had admitted inducing — was proof of "dealing in firearms," showing, inter alia, that Idarecis had devoted "time, attention and labor" to dealing in firearms as a regular course of trade or business. The Government further argued that Idarecis's removal of serial numbers on some of the rifles — which was the result of its inducement to "automatize" — was also proof of "dealing".

Idarecis was convicted and sentenced to concurrent prison terms of 51 months on each of the four counts, the minimum under the Sentencing Guidelines.

4. The Summary Order of the Second Circuit

On October 9, 1998, the Second Circuit issued an eight-page unpublished summary order affirming the conviction (App. A). The Second Circuit accepted that the ATF undercover team had insisted that they were "only interested in purchasing fully automatic rifles" (A-3) and that Idarecis responded to this demand by indicating that he would "find out about making them fully automatic." In reciting the facts, however, the summary order omitted any reference to Idarecis's additional testimony — on two occasions — that he was "sucked in" to the scheme, i.e., to "deal," to automatize his rifles and to remove some of the serial numbers.[6] Although it

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[6] The District Court's denial of the entrapment charge on all counts also depended on its belief that Idarecis's testimony about being "sucked in" could not be evidence of inducement or lack of predisposition since the communication to Idarecis that "sucked him in" may have come from an accomplice, not the ATF informant or undercover agent (B1-B2). However, on the issue of inducement, the Second Circuit assumed for purposes of its decision that the ATF undercover team's activity "was akin to an inducement for gun dealing [and] entitled Idarecis to an entrapment defense under Sherman for the obliteration of serial numbers . . . " (A6). See United States v. Pilarinos, 864 F.2d 253, 255 (2d Cir. 1988) (entrapment defense valid even when inducement communicated to defendant through

assumed Government inducement of Idarecis as to all counts,[7] the summary order upheld the trial judge's determination that Idarecis was not entitled to an entrapment instruction because "there is no evidence to rebut the Government's strong case that Idarecis had the ready propensity to commit the acts for which he was charged . . . " (A-7). The Second Circuit, citing its own precedent, employed an abuse-of-discretion standard of review of the district judge's refusal to give the entrapment issue to the jury. (A-5).

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middleman).

[7] The Second Circuit, for purposes of its decision, assumed that Idarecis was induced by the Government to "deal" in firearms by the ATF undercover team's repetitive insistence on buying automatic rifles from him (A-6). Furthermore, as to the counts dealing with the removal of serial numbers, the Second Circuit further assumed that the ATF undercover team's inducement of Idarecis to automatize some of the rifles was tantamount to an inducement to remove the serial numbers on the rifles. This is so because, once made automatic, such rifles would be illegal even to possess and the removal of a serial number by which Idarecis would otherwise be traced as the original owner, was a natural consequence. (A-5 - A-6). This assumption is based on Sherman v. United States, 356 U.S. 369, 374 (1958), since the removal of serial numbers from rifles the Government importuned Idarecis to automatize was "part of a course of conduct which was the product of the [Government's] inducement." Sherman, supra, 356 U.S. at 374.

REASONS FOR GRANTING THE WRIT

THE PETITION SHOULD BE GRANTED BECAUSE THE SECOND CIRCUIT'S SUMMARY ORDER CONFLICTS WITH THE DECISIONS OF VIRTUALLY ALL OTHER COURTS OF APPEALS ON THE STANDARD OF REVIEW APPLICABLE TO A DISTRICT JUDGE'S FAILURE TO GIVE THE ENTRAPMENT CHARGE

Idarecis's Petition for a writ of certiorari should be granted because the abuse-of-discretion standard of review adhered to in the summary order of the Second Circuit conflicts with the de novo standard of review required by virtually every other circuit considering this matter. Indeed, all the other circuits,[8] with the possible exception of the Ninth Circuit[9], have held that review de novo is required for

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[8] United States v. Glover, 153 F.3d 749, 752 (D.C. Cir. 1998); United States v. Layeni, 90 F.3d 514, 517 (D.C. Cir. 1996); United States v. Panet-Collazo, 960 F.2d 256, 259 (1st Cir. 1992); United States v. McKenna, 889 F.2d 1168, 1174 (1st Cir. 1989); United States v. Rodriguez, 858 F.2d 809, 812 (1st Cir. 1988) ("plenary" review); United States v. Wright, 921 F.2d 42, 44 (3rd Cir. 1990) ("plenary" review); United States v. Singh, 54 F.3d 1182, 1189 (4th Cir. 1995); United States v. Nations, 764 F.2d 1073, 1080-81 (5th Cir. 1985); United States v. Clarke, 1997 U.S. App. LEXIS 30126 (p. 2) (6th Cir. 1997) (unpublished); United States v. Brown, 136 F.3d 1176, 1185 (7th Cir. 1998); United States v. Lewis, 987 F.2d 1349, 1353 (8th Cir. 1993); United States v. Ortiz, 804 F.2d 1161, 1164 & n.2 (10th Cir. 1986); United States v. Nusz, 1994 U.S. App. LEXIS 2940 (p. 7) (10th Cir. Feb. 18, 1994) (unpublished) (reported in table case format at 17 F.3d 1437); United States v. Gates, 967 F.2d 497, 499-500 (11th Cir. 1992).

[9] The Ninth Circuit is internally split on this issue. As noted in United States v. Reynolds, 1993 U.S. App. LEXIS 10265, pp. 18-19,

determining whether the failure to give the entrapment charge — thus taking such a defense away from the jury — requires a new trial.

Where the government has acted to induce an individual to break the law, and that individual claims entrapment, "the prosecution must prove beyond a reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by government agents." Jacobson v. United States, 503 U.S. 540, 549, 112 S.Ct. 1535, 1540 (1992). The entrapment issue is ordinarily one for the jury to resolve. Mathews v. United States, 485 U.S. 58, 63, 108 S.Ct. 883, 887 (1988); Sherman v. United States, 356 U.S. 369, 377, 78 S.Ct. 819, 823 (1958). Indeed, jury resolution of the entrapment issue is fundamental to the basic Sixth Amendment right of trial by jury. As this Court put it in Sherman, supra, "[t]he issue of whether a defendant has been entrapped is for the jury as part of its function of determining the guilt or innocence of the accused." The only exception to this rule is when the issue of whether a defendant has been entrapped "can be decided as a matter of law ...". Sherman, supra, 356 at 377, 378 S.Ct. at 823 (emphasis added).

If a jury must be satisfied beyond a reasonable doubt that a defendant was predisposed to commit the crime prior to first being approached by Government agents, Jacobson, supra, then it would certainly be anomalous for the district court to have discretion as to whether the jury even hears the entrapment defense. Since an entrapment instruction includes a subjective test for determining if a person was predisposed to commit the crimes charged, see United States v. Russell, 411

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reported in table case format at 992 F.2d 1220 (9th Cir. 1993) (unpublished opinion), "[t]here is an unresolved split in this circuit as to whether the refusal to give an entrapment instruction is reviewed for abuse of discretion or de novo".

U.S. 423, 433, 93 S.Ct. 1637, 1644 (1973), the importance of de novo review is manifest.

When issues of fact are resolved by a trial judge "as a matter of law," the standard of review is traditionally de novo. This is so in criminal cases. E.g., Ornelas v. United States, 517 U.S. 690, 697, 116 S.Ct. 1657, 1662 (1996) (determination of probable cause or reasonable suspicion reviewed de novo, with no deference to trial court's determination); Miller v. Fenton, 474 U.S. 104, 114, 106 S.Ct. 445 (1985) (mixed question of law and fact, i.e., voluntariness of a confession, determined de novo). The same is true in civil cases. E.g., Agosto v. Immigration and Naturalization Service, 436 U.S. 748, 754, 98 S.Ct. 2081, 2086 (1978) (summary judgment, subject to de novo review); see 19 Moore's Federal Practice, § 206.04[3][a].

The importance of de novo review is also underscored when a trial judge's ruling may deprive the defendant of his right to present his defense to the jury in a criminal trial. Stevenson v. United States, 162 U.S. 313, 16 S.Ct. 839 (1896), followed in Mathews v. United States, supra, 485 U.S. at 63, 108 S.Ct. at 887. The Second Circuit itself in United States v. Gole, 158 F.3d 166, 168 (2d Cir. 1998), only weeks after the decision below in Idarecis's case, held that while evidentiary rulings at trial are reviewable for abuse of discretion, "it is well established that '[t]he legal sufficiency of a proper defense is a question of law and is therefore reviewed de novo. United States v. Santiago-Godinez, 12 F.3d 722, 726 (7th Cir. 1993)'." Ironically, Santiago-Godinez, the only authority cited on this point by the panel opinion in Gole, itself dealt with the very issue raised in this petition — the standard of review of a district court's determination not to give the entrapment charge. The Seventh Circuit, after reviewing the issue in detail, held unequivocally (and contrary to the Second Circuit below), that the "legal sufficiency of a proper defense is a

question of law and is therefore reviewed de novo" and applied this standard of review to the district court's failure to give the entrapment instruction.

The Second Circuit summary order also equivocates on the very rule it applied. Thus, the summary order states, "[w]hen government inducement has been shown, jury determinations on the question of the defendant's propensity to commit the crime are favored." Summary Order (A5) (emphasis added). The importance of de novo review is also underscored here by the Second Circuit's failure to discuss in its summary order the testimony of Idarecis that he was "sucked in", focusing solely on Idarecis's testimony about not immediately agreeing to the automatizing of the rifles (as demanded by the ATF undercover team) as the only possible proof of lack of propensity. Again, the summary order gave a hesitating dismissal to Idarecis's argument: "Although jury determinations on the question of propensity are preferred, this single ambiguous statement by the defendant is not enough to create a jury issue." (A6; emphasis added.)

The Second Circuit's summary order, in adhering to the abuse of discretion standard, cited a prior Second Circuit case, United States v. Mayo, 705 F.2d 62, 68 (2d Cir. 1983). Mayo, in turn, cited a Ninth Circuit opinion, United States v. Fleishman, 684 F.2d 1329, 1342 (9th Cir. 1982), cert. denied, 459 U.S. 1044 (1982), which did, indeed, hold that "[w]hether there exist issues of fact as to a defense of entrapment is properly a question for the trial judge, the standard of review being abuse of discretion." However, as noted, the Ninth Circuit itself now has conflicting panel opinions on the subject.

Petitioner respectfully submits that de novo review would likely result in a different decision in this case. Indeed, in light of the strong evidence that Idarecis was, as he testified, "sucked in", his hesitancy in automatizing the rifles,

his refusal to remove the serial number from the first rifle sold, and his further testimony that he initially never intended to automatize the rifles nor remove serial numbers, this petitioner -- up to that point a wholly law-abiding citizen -- should have been entitled to have the jury consider the entrapment defense.

CONCLUSION

The importance of a uniform standard of review for the propriety of refusing an entrapment instruction is underscored by the extensive Government use of undercover informants and agents to solicit violations of the law. The Second Circuit's adherence to an abuse-of-discretion standard of review is, we submit, incorrect in light of the previous decisions of this Court on related matters involving the standard of review for courts of appeals in federal criminal matters. Moreover, the Second Circuit's decision conflicts with the other circuits. Accordingly, the issue of what standard of review should guide the United States courts of appeals in reviewing a district judge's failure to charge the entrapment defense to the jury should be settled by this Court.

Accordingly, Petitioner respectfully requests that his petition for a writ of certiorari be granted.

Respectfully submitted,

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Attorney for Petitioner
Michael Idarecis

January 21, 1999

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 9th day of October, one thousand nine hundred and ninety-eight.

PRESENT:

HON. RICHARD J. CARDAMONE,

HON. GUIDO CALABRESI,

HON. CHESTER J. STRAUB,

Circuit Judges.

SUMMARY ORDER # 97-1629

UNITED STATES OF AMERICA,

Appellee,

v.

MICHAEL IDARECIS,

Defendant-Appellant.

Appearing for Appellant: GUY L. HEINEMANN, New York, NY

Appearing for Appellee: CATHERINE FRIESEN, Assistant United States Attorney, Eastern District of New York, Brooklyn, NY

Appeal from the United States District Court for the Eastern District of New York (Carol B. Amon, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the District Court be and it hereby is AFFIRMED.

Michael Idarecis appeals from a judgment of conviction entered on November 4, 1997, following a jury trial in the United States District Court for the Eastern District of New York (Amon, *J.*), for possessing weapons with obliterated serial numbers in violation of 18 U.S.C. § 371, for dealing in firearms without a license in violation of 18 U.S.C. § 922(a)(1), and for conspiring to commit those crimes.

I

Idarecis was an owner of a small business. He also owned many guns. In early 1996, due to personal financial difficulties, Idarecis decided to sell some of his semi-automatic rifles and pistols, all of which had been lawfully purchased. Following several unsuccessful attempts to sell the weapons, Idarecis asked one of his employees, Ray Brinkley, if he knew of any buyers. Brinkley communicated Idarecis' query to a co-worker, Paul Caputo, who, in turn, made the same inquiry to his friend James "Buddy" Bonilla. Bonilla referred Caputo to James Tucker. Unbeknownst to Idarecis or his

employees, Tucker was an informant for the Bureau of Alcohol, Tobacco, and Firearms ("ATF").

Idarecis and Caputo met with Tucker to discuss the sale of Idarecis' guns. At that meeting, Tucker insisted that he was only interested in purchasing fully automatic rifles. Although Idarecis' rifles were not capable of firing automatically, Idarecis responded that he would "find out about making them fully automatic." In addition, Idarecis gave Tucker a list of prices for the weapons they had discussed as well as for other firearms, including a Tommy gun, an AK-46, two AK-47s, and an Uzi.

A few days later, Caputo, acting on Idarecis' behalf, sold one of Idarecis' AK-47s to Tucker's associate, ATF agent Arnold Allen, who was operating in an undercover capacity at the time. This rifle did not fire automatically and was sold with its serial numbers intact. Subsequently, agents Allen and Tucker purchased additional guns from Idarecis. Some of these weapons were successfully converted into automatic rifles, and some were without their serial numbers. Idarecis testified at trial that he could not remember whether Caputo, Brinkley, or Tucker had suggested that the serial numbers be obliterated. Caputo, however, testified that it was Brinkley who suggested filing down the serial numbers, and Agent Allen testified that he did not know that the serial numbers would be obliterated.

The government charged Idarecis with possession of weapons with obliterated serial numbers, with dealing in firearms without a license, and with conspiring to commit each of these offenses. At trial, the district court rejected Idarecis' proposed jury instruction on entrapment, concluding: (1) that there was not enough evidence to support an entrapment instruction; and (2) that the entrapment Idarecis alleged went only to an evidentiary issue in the case and was therefore insufficient as a matter of law to support an entrapment instruction. In its summation, the government pointed to Idarecis'

conversion of his rifles into automatic weapons and his obliteration of their serial numbers as part of its evidence that Idarecis was an unlicensed gun "dealer" within the meaning of § 922(a)(1).

Following his conviction, Idraecis moved for a new trial based on a claim of newly discovered evidence. As part of his trial defense, Idarecis asserted that he had sold five or six of his rifles to George Antonakis, and that those weapons were not sold as automatics and that they had retained their serial numbers. Antonakis, however, testified that he had only purchased two guns from Idarecis. An affidavit submitted with the new trial motion by an acquaintance of Idarecis who did not testify at trial asserted that Antonakis had actually purchased more than two rifles from Idarecis. The district court denied the motion for a new trial.

Finally, and for the first time on appeal, Idarecis claims that what he sold was a gun *collection* and, therefore, he was explicitly exempt from the requirements of § 922(a)(1) by 18 U.S.C. § 921(a)(21)(C) and (A)(22).

We find all of Idarecis' contentions to be without merit and affirm the district court.

II

Idarecis' first argument is that he was entitled to have an entrapment instruction given to the jury. We have stated that an entrapment defense raises two questions:

> (1) did the [government] agent induce the accused to commit the offence charged in the indictment; (2) if so, was the accused ready and willing without persuasion and was he awaiting any propitious opportunity to commit the offence. On the first question the accused has the burden; on the second the prosecution has it.

United States v. Sherman, 200 F.2d 880, 882-83 (2d Cir. 1952). When government inducement has been shown, jury determinations on the question of the defendant's propensity to commit the crime are favored. *See United States v. Riley*, 363 F.2d 955, 959 (2d Cir. 1966) ("[A]ny evidence negating propensity, whether in cross-examination or otherwise, requires submission to the jury, however unreasonable the judge would consider a verdict in favor of the defendant to be."). But "[i]f the government's evidence of propensity stands uncontradicted, there is no factual issue for the jury to resolve and the defense will not be submitted." *United States v. Mayo*, 705 F.2d 62, 68 (2d Cir. 1983) (citing *United States v. Licursi*, 525 F.2d 1164, 1169 (2d Cir. 1975)). We review the trial judge's determination that no factual issue existed to support an entrapment defense for abuse of discretion, while examining the record in the light most favorable to the defendant. *See Mayo*, 705 F.2d at 68.

The crux of Idarecis' entrapment claim with respect to the gun dealing charge is that Tucker's demand and Allen's demand for automatic weapons induced him into engaging in a pattern of unlicensed sales. As such, Idarecis contends that enough evidence was presented to raise a jury issue as to his propensity to commit the crime of gun dealing. In addition, Idarecis asserts that he was entitled to an entrapment instruction with respect to the obliteration of serial numbers offense as well. Although there is no evidence to support the assertion that the government, either directly or indirectly, induced Idarecis to remove the serial numbers from any of his weapons, Idarecis, relying on *Sherman v. United States*, 356 U.S. 369 (1958), nevertheless contends that the alleged entrapment with respect to the gun dealing offense should also apply to the serial number offense because the latter was "part of a course of conduct which was the product of the

[government's] inducement."[1] *See Sherman*, 356 U.S. at 374.

The central issues in this case, therefore, are whether Tucker's request that Idarecis automate his weapons was an inducement to "deal" in guns within the meaning of § 922(a)(1), which makes it unlawful for any person except a licensed dealer to "engage in the business of . . . dealing in firearms," and if it was, whether the government's evidence on propensity was sufficiently rebutted to warrant an entrapment instruction.

We agree with the district court that, even if Tucker's inducement of Idarecis to automate the rifles was akin to an inducement for gun dealing or entitled Idarecis to an entrapment defense under *Sherman* for the obliteration of serial numbers, the entrapment claim would still fail because there is no evidence that Idarecis lacked the propensity to automate the weapons for Tucker. *See Licursi*, 525 F.2d at 1169. The only fact that could conceivably be construed in Idarecis' favor on this point is that he initially told Tucker he would "find out" about making the rifles automatic rather than agreeing unequivocally to do so. Although jury determinations on the question of propensity are preferred, this single ambiguous statement by the defendant is not enough to create a jury issue. *Cf. United States v. Anglada*, 524 F.2d 296, 299 (2d Cir. 1975) (holding that a government agent taking forty-five minutes to persuade the defendant to commit a crime crossed the threshold to create a jury question); *Riley*, 363 F.2d at 957 (finding that a government informant persuading a defendant to commit a crime by saying that the informant's wife was sick and needed narcotics was enough to create a jury issue on the defendant's propensity).

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[1] This *Sherman* case was based on the same set of facts as the Second Circuit *Sherman* case quoted earlier, but involved an appeal from a separate opinion of our court. *See United States v. Sherman*, 240 F.2d 949 (2d Cir. 1957), *rev'd*, 356 U.S. 369 (1958).

Since there is no evidence to rebut the government's strong case that Idarecis had the ready propensity to commit the acts for which he was charged, we need not consider whether Idarecis was induced by a government agent to commit those crimes.[2] And we conclude, accordingly, that the district court was correct in ruling that Idarecis was not entitled to an entrapment instruction either on the dealing charge or on the charge of erasing the serial numbers from his guns.

Idarecis' second contention is that the jury should have been instructed on the exemption in § 921(a)(21)(C) for an individual "who sells all or part of his personal collection of firearms." This argument was not raised below, and therefore we review for plain error. *See United States v. Eltayib*, 88 F.3d 157, 170 (2d Cir.), *cert. denied* 117 S. Ct. 619 (1996). A gun "collector" is defined as "any person who acquires, holds, or disposes of firearms as curios or relics," which clearly does not apply to Idarecis. *See* 18 U.S.C. § 921(a)(13) (Supp. 1998). He nevertheless argues that the definition of a gun "collection" in § 921(a)(21)(c) should be read more broadly than the definition of a gun "collector" in order to encompass the guns Idarecis owned and sold.

We cannot say that the district court's failure to instruct the jury on the collection exemption pursuant to § 921(a)(21)(C) was plain error. There is no case authority to suggest that there is a distinction between the definition of a collector and of a collection in the statute. In the absence of such authority, plain error review dictates that we must reject Idarecis' novel claim. *See United States v. Viola*, 35 F.3d 37, 41 (2d Cir. 1994) ("[T]he error must be 'plain,' which at a minimum means 'clear under current law.'") (quoting *United States v. Olano*, 507 U.S. 725, 734 (1993)).

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[2] Because we do not reach the question of inducement we also need not decide whether--as Idarecis argues--entrapment on an evidentiary issue can be converted into an entrapment defense.

In addition, Idarecis contends that the government should have been "estopped" from arguing in summation that his willingness to make his guns automatic was evidence of his engaging in gun dealing because the government had previously maintained that, for the purpose of entrapment, inducement to automate "had nothing to do" with inducement to deal and to obliterate serial numbers. We see no inconsistency--let alone injustice--in the government's positions. Idarecis' estoppel claim is therefore unavailing.

Finally, Idarecis' contention that he was entitled to a new trial due to newly discovered evidence is without merit. Even if the new information about how many guns Idarecis sold to Antonakis is true, there is no reason to believe that it would have affected the outcome of the trial.

We have considered all of Idarecis' arguments, and found them to be without merit. The judgment of the district court is therefore affirmed.

Transcript of Proceedings of April 28, 1997 --
United States v. Idarecis, 97-CR-88 (CBA) (E.D.N.Y.)

THE COURT: * * *

I don't know, Mr. Burns. I fully recognize the law in this area and I know what the legal principles are and I note if there is any theory of defense that the defendant is entitled to have it articulated. If there was any colorable basis for entrapment defense, the Court should charge it. But based on his own testimony, I don't see that -- well, I think, looking at the different offenses I suppose it is two different analyses. As I said, in terms of putting out the law, I know that it is well established a criminal defendant is entitled to a jury charge that reflects any defense theory for which there is a foundation in the evidence. That is United States versus Abcasi, 450 F.3d, 39. And the defendant's meaningful opportunity to present a complete defense is a right guaranteed by the Constitution. A defense theory must be charged so long as it has some foundation no matter how tenuous it may appear to the trial court. Of course, I recognize entrapment has two related elements. First is government inducement of the crimes charge in the indictment and second is lack of predisposition on the part of the defendant to engage in criminal conduct.

Taking the offense, the serial number charges, in other words, possession of guns with obliterated serial numbers and conspiracy to do so, I don't see in the record that there is any inducement of this defendant to engage in that conduct. Indeed, I don't see any admissible evidence in the record that it was the government's idea to obliterate the serial numbers from the guns. The defendant doesn't say it was the government's idea. He doesn't have knowledge of that. There's nothing in the government's testimony or the testimony of any of the government's witnesses that suggests that it was the government's idea. Indeed, the only testimony on the subject

is that it was Ray Brinkley's idea and Ray Brinkley was not a government agent but a coconspirator. Even though you have to show very little for inducement and the government need only show that the government initiated the crime, that soliciting, proposing, initiating, broaching or securing commission of offense may constitute inducement. There is certainly no evidence of inducement on this evidence that I see with respect to that crime and the tape reference, the statement contributed to Mr. Tucker doesn't establish that.

Now, with respect to the second charge which is the business of dealing in firearms charge, it is a somewhat complicated issue I suppose with respect to whether there can be entrapment with regard to an element the government doesn't have to prove but which it's relying on as evidence of its charge, and it seems like to me the government is clearly going to argue to the jury here that what takes or brings this into the realm of the business in dealing in firearms is the very character of the transaction, all of these discussions about all kinds of weapons.

It basically is admitted here that on the issue of per se selling the weapons there's a concession that there was a predisposition with respect to the issue of selling the weapons to begin with. The defendant clearly wanted to sell these weapons because he needed money. Indeed, he expressed that view about wanting to sell the weapons in front of Ray Brinkley, who, again, is a government agent, was one of his coconspirators.

Even if you break it off and have entrapment as to an evidentiary matter as opposed to as to an entire charge, it still seems to me although you may reach the inducement issue with respect to the modification of the firearms to fire automatically that that may have been the government's idea, again I don't see any evidence in this record that suggests that the defendant -- that contradicts the government's evidence of predisposition. There's no evidence the defendant did it

before, but there is evidence on the question of predisposition that he was ready, willing and able to do this if it was necessary to sell the weapons. That, as I say, that evidence of predisposition has not been contradicted and indeed, it is completely, in my view, supported by what the defendant's testimony was in terms of his own statements about puffing in order to sell it.

The sort of conclusory statement that I was sucked in, and there the phrase sucked in is not clear who he contends he was sucked in by, it could be Ray Brinkley who was a coconspirator who was incapable of entrapping him, it might have been someone else, that kind of conclusory statement in light of his other testimony doesn't seem sufficient to this Court.

And, you know, again, the law is straightforward, but inducement has been shown. Entrapment must be submitted to the jury if there is a genuine issue of fact concerning the propensity to commit the crime. However, if the evidence of propensity stands uncontradicted, the defense should not be submitted to the jury because there is no factual issue for the jury to resolve. That is a statement out of a case called Mayo, 705 F.2d at 68.

Also, Salernos states that if a defendant is predisposed to commit a crime if he is ready and willing without persuasion to commit the crime charged and awaiting opportunity to do so. 66 F.3d 545, 2nd Circuit, 1995.

MR. BURNS: That was the Digiralimo case.

THE COURT: Then it says government may show defendant's predisposition by evidence of, among other things, quote, a willingness to commit the crime for which he is charged as evidenced by the accused's ready response to the inducement. As I say, I believe that we have that from his testimony. That's even assuming that one can have entrapment to a portion of the crime. So, under all the circumstances I'm not going to charge entrapment in the case.